

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of	)	
	)	
Consumer & Governmental Affairs Bureau	)	CG Docket No. 02-278
Seeks Comment on Petition for	)	
Expedited Declaratory Ruling from	)	
YouMail, Inc.	)	
	)	
Rules and Regulations Implementing the	)	
Telephone Consumer Protection Act of 1991	)	

**REPLY COMMENTS OF CTIA – THE WIRELESS ASSOCIATION®**

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August 9, 2013

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**REPLY COMMENTS OF CTIA – THE WIRELESS ASSOCIATION®**

**I. INTRODUCTION AND SUMMARY**

CTIA – The Wireless Association® (“CTIA”)<sup>1</sup> respectfully submits these reply comments in response to the June 25, 2013 Public Notice released by the Consumer and Governmental Affairs Bureau (“Bureau”) in the above-captioned proceeding.<sup>2</sup> In the *Public Notice*, the Bureau seeks comment on a Petition for Expedited Declaratory Ruling filed by YouMail, Inc. (“YouMail”),<sup>3</sup> in which YouMail asks the Federal Communications Commission (the “Commission” or “FCC”) to clarify that sending an immediate, one-time text message reply

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<sup>1</sup> CTIA – The Wireless Association® is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the organization covers Commercial Mobile Radio Service (“CMRS”) providers and manufacturers, including cellular, Advanced Wireless Service, 700 MHz, broadband PCS, and ESMR, as well as providers and manufacturers of wireless data services and products. More information about CTIA is available on the Association’s website at <http://www.ctia.org/aboutCTIA/>.

<sup>2</sup> *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling from YouMail, Inc.*, CG Docket No. 02-278, Public Notice, DA 13-2433 (rel. June 25, 2013) (“*Public Notice*”).

<sup>3</sup> See *YouMail, Inc.*, Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed Apr. 19, 2013) (“*Petition*”).

to a voicemail message is not a violation of the Telephone Consumer Protection Act (“TCPA”)<sup>4</sup> or the FCC’s TCPA rules.<sup>5</sup> As discussed below, the Commission should grant the Petition.

CTIA fully supports the goal of preventing unwanted telemarketing calls to consumers and recognizes that, in enacting the TCPA more than twenty years ago, Congress was attempting to alleviate calls that threatened public safety and inappropriately shifted marketing costs from sellers to consumers.<sup>6</sup> However, YouMail’s service is not the type of communication that Congress was trying to address with the TCPA. Instead, the YouMail mobile phone application allows the recipient of a call to send an immediate reply to a voicemail using a single text message. The voicemail reply text messages facilitated by YouMail’s “virtual receptionist” application are not sent using an “automatic telephone dialing system” (or “autodialer”) because the relevant equipment (used to send the messages to callers who have left a voicemail for a YouMail user) lacks the “capacity” to store or produce, and dial, random or sequential numbers. Moreover, it is the YouMail user, not YouMail, that determines whether a text message is sent, as well as the timing, content, and recipient of the message. In addition, the voicemail reply text messages are sent with the “prior express consent” of the recipients.

The YouMail software application also advances the TCPA’s goal of improving public safety. Importantly, the YouMail application enables parties to respond to incoming calls when they might otherwise be unable to answer the phone or send a text message, without picking up their phone, such as while they are driving or in transit. CTIA shares this public safety goal, and

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<sup>4</sup> 47 U.S.C. § 227.

<sup>5</sup> See 47 C.F.R. § 64.1200 *et seq.*

<sup>6</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 ¶ 133 (2003) (“*2003 TCPA Report and Order*”), citing S. Rep. No. 102-178, at 5 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1972-73 (“The Committee believes that Federal legislation is necessary to protect the public from automated phone calls. These calls can be an invasion of privacy, an impediment to interstate commerce, and a disruption to essential public safety services.”) (“*1991 Senate Report*”).

many of its members, including wireless carriers and more than 200 other organizations, participate and actively support the “It Can Wait” campaign, which targets distracted driving by encouraging consumers to pledge not to text while driving.<sup>7</sup>

Confirming that parties may send immediate, one-time non-telemarketing text messages also advances the Commission’s efforts not to unnecessarily impede purely informational calls to consumers on their wireless telephone numbers. Consumers increasingly rely on mobile devices as their primary or even exclusive means of communication and expect that they will be able to receive informational messages on these devices. However, the lack of clarity over the definition of “autodialer” has sustained the dramatic rise in TCPA class actions in recent years,<sup>8</sup> and dampened innovations that could benefit consumers. Given this environment, the Commission should grant the YouMail Petition promptly to ensure that innovation in the mobile marketplace is not stifled further.

## **II. THE YOUMAIL APPLICATION IS NOT AN “AUTOMATIC TELEPHONE DIALING SYSTEM”**

Although the TCPA restricts the delivery of “autodialed” calls and text messages to wireless telephone numbers absent an emergency or the “prior express consent” of the called party,<sup>9</sup> the YouMail software used to facilitate the sending of one-time voicemail reply text

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<sup>7</sup> It Can Wait Campaign, <http://www.att.com/gen/press-room?pid=2964> (last accessed Aug. 6, 2013).

<sup>8</sup> See, e.g., Comments of Nicor Energy Services Company, CG Docket No. 02-278, 5 (filed July 25, 2013) (noting that class actions involving autodialed calls, including text messages, rose 592 percent between 2008 and 2011) (“Nicor Comments”); Comments of Communication Innovators, CG Docket No. 02-278, 3 (filed July 25, 2013) (“More than 500 TCPA cases have already been filed in 2013, nearly double the number filed during the same period in 2012.”) (“Communication Innovators Comments”).

<sup>9</sup> See 47 U.S.C. § 227(b)(1)(A); 47 C.F.R. § 64.1200(a)(1); see also 2003 TCPA Report and Order at ¶ 165 (concluding that the TCPA’s restriction on autodialed and prerecorded or artificial calls encompasses both voice calls and text messages, including SMS); *Rules and Regulations Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003*; *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 19 FCC Rcd 15927 ¶ 17 (2004) (stating that “the TCPA prohibition on using automatic telephone dialing systems to make calls to wireless phone numbers applies to text messages (e.g., phone-to-phone SMS), as well as voice calls”).

messages lacks the ability to store or produce or dial random or sequential numbers.<sup>10</sup> Therefore, the sending of a one-time reply text message in response to a voicemail left for a YouMail user does not violate the TCPA restriction on autodialed calls.

The TCPA defines “automatic telephone dialing system” or “autodialer” as “equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”<sup>11</sup> The phrase “using a random or sequential number generator” modifies “to store or produce telephone numbers to be called.” In addition, the phrase “to dial such numbers” refers to dialing numbers that have been randomly or sequentially generated. Thus, under the plain language of the TCPA, equipment that has no ability or “capacity” to store or produce, and dial, randomly or sequentially generated numbers is not an autodialer.

In drafting the TCPA, Congress recognized that the Commission would need to consider changes in technology as it implements and interprets the TCPA,<sup>12</sup> and a growing number of parties have encouraged the Commission to clarify and update its interpretation of the autodialer definition to avoid sweeping in new technologies. For example, several parties have highlighted

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The Commission has adopted a requirement that the consent be in writing if the call is for telemarketing purposes. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 27 FCC Rcd 1830 ¶ 20 (2012) (“*Robocall Report and Order*”).

<sup>10</sup> See Petition at 9. It appears that at least some of the messages that are facilitated by YouMail could be Simple Mail Transport Protocol (SMTP)-based messages, which are sent to an address such as name@carrier.com, meaning the mobile phone essentially receives an e-mail. *See FAQs—Basics of CSCs*, Common Short Code Administration, <http://www.usshortcodes.com/about-sms-short-codes/sms-marketing-faqs.php> (last accessed Aug. 2, 2013). The extent to which the TCPA applies to such “Internet-to-phone” text messages remains pending before the Commission. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Revolution Messaging’s Petition for an Expedited Clarification and Declaratory Ruling*, CG Docket No. 02-278 (filed Jan. 19, 2012).

<sup>11</sup> 47 U.S.C. § 227(a)(1); 47 C.F.R. § 64.1200(f)(1).

<sup>12</sup> See 2003 TCPA Report and Order at ¶ 132, *citing, inter alia*, 137 Cong. Rec. S18781-02 (1991) (statement of Sen. Hollings) (“The FCC is given the flexibility to consider what rules should apply to future technologies as well as existing technologies.”).

the confusion over what equipment constitutes an autodialer (especially what it means to have the requisite “capacity” to be considered an autodialer) and how this confusion has resulted in a rapidly expanding cavalcade of TCPA class action lawsuits.<sup>13</sup>

YouMail’s system as described in the Petition does not meet the definition of an autodialer. According to YouMail, the software and hardware behind its application “was not created to store or produce or dial telephone numbers in any random or sequential manner or even to call them from a list or database” and, as “it was not designed to do any of these things, it does not.”<sup>14</sup> Instead, the YouMail system is designed to facilitate the sending of a single, immediate reply text message on behalf of a YouMail user in response to a voicemail message.<sup>15</sup> The YouMail application does not create or use a calling list, or provide a means for users to create or use such lists. It also cannot store or produce randomly or sequentially generated numbers.<sup>16</sup> In addition, there are no settings that would allow YouMail application users to alter or configure the application to allow it to function as an autodialer.

Commenter Joe Shields is correct to point out that, in drafting the TCPA, Congress was aware of concerns that the definition of autodialer could inadvertently be interpreted to cover “the mere ownership of office computers which are capable, perhaps when used in conjunction

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<sup>13</sup> See, e.g., Petition at 1-2, 9-11; *SoundBite Communications, Inc.*, Petition for Expedited Declaratory Ruling, CG Docket No. CG 02-278, 1-2 (filed Feb. 16, 2012); *Communication Innovators*, Petition for Declaratory Ruling, CG Docket No. 02-278, 14-16 (filed June 7, 2012); *GroupMe, Inc.*, Petition for Expedited Declaratory Ruling and Clarification, CG Docket No. 02-278, 2-3, 14-15 (filed Mar. 1, 2012); *Ex Parte* filing by Encore Capital Group, Inc., CG Docket No. 02-278 (filed Feb. 27, 2012); *Ex Parte* filing by the Progressive Group of Insurance Companies, CG Docket No. 02-278 (filed Oct. 21, 2011).

<sup>14</sup> Petition at 9 (emphasis original).

<sup>15</sup> See *id.* at 3.

<sup>16</sup> The Commission has noted that the restrictions of the TCPA “clearly do not apply to functions like ‘speed dialing,’ ‘call forwarding,’ or public telephone delayed message services...because the numbers called are not generated in a random or sequential fashion.” *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752, 8775 ¶ 47 (“1992 TCPA Order”).

with other equipment, of delivering automated messages.”<sup>17</sup> Therefore, to avoid this overbroad interpretation, Congress clarified that its intent was to restrict the active “use” of such equipment, specifically “to deliver automatically dialed prerecorded telephone solicitations without live operator intervention,” because of concerns that consumers’ lines were being “seized.”<sup>18</sup> In this case, YouMail is an application that is downloaded by a consumer to a smartphone, and it does not employ any such “equipment” to facilitate the delivery of users’ text messages.<sup>19</sup> Moreover, sending a single text message does not “seize” a mobile device.<sup>20</sup>

YouMail’s system is also not an autodialer because it does not have the “capacity” to store or produce random or sequential numbers, or to dial such numbers. CTIA agrees with YouMail and other commenters that the Commission should clarify that to be considered an autodialer, a program or device must have the “current capacity” to store or produce random or sequential numbers, and to dial such numbers.<sup>21</sup> Instead of asking whether the equipment in

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<sup>17</sup> Comments of Joe Shields, CG Docket No. 02-278, 2 (filed July 25, 2013) (“Shields Comments”), citing H.R. Rep. No. 101-633 (1990) (“1990 House Report”).

<sup>18</sup> See 1990 House Report at 10. In addition, Congress noted that unsolicited calls to cellular telephone numbers often imposed a cost on the called party, with cellular users paying for each incoming call. See 1991 Senate Report at 1969. Since the TCPA was enacted, however, mobile telephone plans for many consumers have shifted to include unlimited voice minutes and text messaging. Many consumers subscribe to these plans, which means that they will not incur any expenses from receiving an additional text message. See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; SoundBite Communications, Inc. Petition for Declaratory Ruling, Declaratory Ruling, 27 FCC Rcd 15391 ¶ 10 (2012) (“SoundBite Declaratory Ruling”).

<sup>19</sup> See Petition at 7 (“The software runs on generic hardware according to the specific protocol of the software program and the user’s settings.”).

<sup>20</sup> The primary concern evinced in the Congressional record is that automated calls were not properly disconnecting, which prevented the called party from making her own calls, and autodialed calls did not respond to human voice commands to disconnect the phone, especially in times of emergency. See 1991 Sen. Report at 1969; 1990 House Report at 10 (“Once a phone connection is made, automatic dialing systems can ‘seize’ a recipient’s telephone line and not release it until the prerecorded message is played, even when the called party hangs up. This capability makes these systems not only intrusive, but, in an emergency, potentially dangerous as well.”).

<sup>21</sup> See Petition at 11 (“YouMail submits that the Commission affirmatively state that only equipment that has a current capacity to store and produce telephone numbers to be called using a random or sequential number generator – and is currently being used for that purpose – should be considered an [autodialer].”)



question could ever, “under any circumstances,” be modified to serve as an autodialer, the Commission should confirm that only equipment that has a “current capacity” to store and produce numbers to be called using a random or sequential number generator, and is currently being used for that purpose, qualifies as an autodialer. It is informative that in drafting the TCPA, Congress chose to use the present tense – “has the capacity” – to define equipment that should be considered an autodialer, rather than specifying that such equipment “could have” such capacity.

In addition, the legislative intent in drafting the definition of “autodialer” was to distinguish between certain types of calling equipment, to enable the Commission to better enforce the TCPA. An expansive interpretation would collapse this distinction and render the carefully drafted language of the TCPA meaningless. As several commenters point out, one concern raised by an expansive definition of “autodialer” is that, as the capabilities of consumer devices such as smartphones become increasingly sophisticated, any business or consumer that makes a call using a device with the theoretical or future capacity to store or produce, and dial, random or sequential telephone numbers could be subject to a TCPA lawsuit.<sup>22</sup> Given the

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(emphasis original); *see also* Communication Innovators Comments at 2, 3-5; Comments of American Financial Services Association, CG Docket No. 02-278, 3-4 (filed July 19, 2013) (“AFSA Comments”).

<sup>22</sup> *See* Communication Innovators Comments at 5-6 (arguing that the lack of clarification on “capacity” “could subject businesses and consumers to TCPA litigation if they send a text message or even manually dial a voice call to a wrong number, as such calls would be viewed as made using an autodialer”); AFSA Comments at 1-3 (“[I]n today’s world it is almost impossible to use telephone systems that do not have, either as originally configured or as could be modified, the capacity to generate, store and dial random or sequential numbers.”). The challenge posed by this situation is highlighted by commenter Biggerstaff, who acknowledges that “[a]ll dialers have the capacity for expansion and modification” to act as an autodialer. Comments of Robert Biggerstaff on the Petition of YouMail, CG Docket No. 02-278, 2-3 (filed July 25, 2013) (“Biggerstaff Comments”); *see also* Gerald Roylance’s Comments on YouMail’s Petition, CG Docket No. 02-278, 12 (filed July 25, 2013) (“[A]n iPhone application can easily be an [autodialer] if it dials a list of numbers without human intervention or if it automatically keeps redialing a number until it gets through.”) (“Roylance Comments”); Comments of Megan Gold, CG Docket No. 02-278, 11 (filed July 25, 2013) (“If *equipment* has the capacity to store or produce telephone numbers to be

dramatic increase in TCPA litigation, an expansive definition of autodialer could give rise to lawsuits against ordinary consumers who use a smartphone.<sup>23</sup> Taken to the extreme suggested by a few individual commenters, including Robert Biggerstaff, all devices with calling or messaging capabilities could be considered autodialers because they can be modified – whether through hacking, third-party software or hardware configurations, or other deviations from their intended use – to generate telephone numbers randomly or sequentially. In light of this growing confusion, the Commission should clarify that one-time non-telemarketing reply text messages in response to a voicemail message are not autodialed.

### **III. YOUMAIL IS NOT THE PARTY “MAKING” OR “INITIATING” THE CALL UNDER THE TCPA**

CTIA agrees with YouMail that it is the YouMail user, and not YouMail, that sends the text message to the caller (*i.e.*, “makes” or “initiates” the call). To use the YouMail application, a consumer must first download and install the YouMail application on his or her smartphone.<sup>24</sup> The YouMail user then sets up the application and determines whether voicemail reply text messages will be sent at all, as well as which callers should receive these messages. The YouMail user also determines the content of the text messages.<sup>25</sup> As YouMail notes, “YouMail

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called using a random or sequential number generator today, then it has that same capacity tomorrow, and on any other day.”) (emphasis in original).

<sup>23</sup> This issue is of special concern as the number of wireless-only households continues to increase. The National Center for Health Statistics estimated that in the first half of 2012, only 9.4 percent of households in the U.S. were landline-only. *See CTIA – The Wireless Association®, CTIA’s Wireless Industry Indices: Year-End 2012 Results*, 33 (May 2013). Moreover, more than half of U.S. households are wireless-only or wireless mostly. *See id.*

<sup>24</sup> *See* YouMail, <http://www.youmail.com/> (last accessed Aug. 1, 2013).

<sup>25</sup> Although YouMail supplies a generic message, which includes the called party’s first name and phone number, the YouMail user affirmatively selects whether to use that message or replace it with a personalized message. *See* YouMail, <http://www.youmail.com/>; *see also* Petition at 12; Biggerstaff Comments at 4 (“YouMail does not appear to be responsible for any portion of the *content* of the message”) (emphasis original).

does not dictate whether any call is made, the time a call is made, or the telephone number to which” a reply text message is sent.<sup>26</sup>

By downloading the YouMail application and affirmatively selecting the option of sending an immediate reply text message to callers who leave voicemails, the YouMail user has asked YouMail to send a reply text message on his or her behalf.<sup>27</sup> The YouMail application functions like an answering service and provides a brief, customizable text message to a caller,<sup>28</sup> similar to how Microsoft Outlook can be set (by the user) to send immediate out-of-office messages. The YouMail “virtual receptionist” software only sends a one-time voicemail reply text message, and only when the YouMail user has adjusted its settings to do so.<sup>29</sup>

In addition, YouMail is not responsible for the content of the message that is sent to the caller, but simply functions as the conduit for the message.<sup>30</sup> The YouMail user determines the recipient of the text messages, as the user can choose to send a message to none, some, or all callers.<sup>31</sup> YouMail also does not have any input into the timing of the text messages, as they are

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<sup>26</sup> Petition at 12.

<sup>27</sup> See generally Comments of CallFire, Inc., CG Docket No. 02-278 (filed July 25, 2013) (“CallFire Comments”). See also Biggerstaff Comments at 6 (“In one sense, the YouMail user determines ‘if’ a message will be sent in response to a voice mail.”). The YouMail Terms of Use Agreement requires that a user affirm that YouMail is acting as his or her “agent,” and clarifies that YouMail relies on the user’s representation that the user has obtained “all necessary permissions to answer all incoming calls to the number” provided, and “to send text or e-mail messages” to callers “in response to any call or provided voicemail.” YouMail Terms of Use Agreement, <http://www.youmail.com/termsfuse.html> (last accessed Aug. 6, 2013) (“YouMail Terms of Use”).

<sup>28</sup> See Petition at 2.

<sup>29</sup> See *id.* at 7.

<sup>30</sup> See Biggerstaff Comments at 4-5 (“Based on YouMail’s representations, and my own experience in both packet-switched and circuit-switched networking topologies and operations, I agree that YouMail appears to be principally executing directives on behalf of their customer...”); CallFire Comments at 4 (stating that “platform providers” such as YouMail “operate as intermediate conduits, and should be recognized as such.”). Commenter Biggerstaff notes that YouMail’s role as a conduit, rather than a party to the message, “would militate against liability of YouMail.” Biggerstaff Comments at 5.

<sup>31</sup> See Petition at 3.

sent immediately in response to the receipt of a voicemail from a recipient that the YouMail user has determined should receive such a message.<sup>32</sup>

In a recent Declaratory Ruling, the Commission clarified that the “initiation” of a call suggests a “direct connection between a person or entity and the making of a call.”<sup>33</sup> Specifically, a person or entity initiates a telephone call “when it takes the steps necessary to physically place a telephone call.”<sup>34</sup> YouMail does not initiate the text messages sent by the YouMail user, because its software is designed to send messages only under the circumstances determined by the user, who determines when the call should be made.<sup>35</sup> No commenter has suggested that, absent action on the part of the YouMail user, YouMail would send any text messages to any recipient.

#### **IV. NON-TELEMARKETING VOICEMAIL REPLY TEXT MESSAGES ARE SENT WITH THE “PRIOR EXPRESS CONSENT” OF THE CALLED PARTY**

Even if the Commission were to find that informational, non-telemarketing reply text messages should be considered autodialed calls, they are nonetheless exempt from the TCPA’s restriction on autodialed calls to wireless telephone numbers because they are made with the

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<sup>32</sup> See *id.* at 14 (“[T]he sending of an auto-reply is a one-time event that occurs in close proximity to the calling party leaving a message” for a YouMail user.).

<sup>33</sup> *The Joint Petition Filed by DISH Network, LLC, the United State of America, and the States of California, Illinois, North Carolina, and Ohio for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules; The Petition Filed by Philip J. Charvat for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules; The Petition Filed by DISH Network, LLC for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules*, Declaratory Ruling, 28 FCC Rcd 6574 ¶ 26 (2013) (“*DISH Declaratory Ruling*”).

<sup>34</sup> *Id.*

<sup>35</sup> Some commenters have suggested that YouMail users should be subject to liability under the TCPA for the sending of any reply text messages. See Biggerstaff Comments at 5; Shields Comments at 3; Roylance Comments at 13. Such an expansive interpretation of the TCPA would prevent consumers from being able to send out-of-office messages by text message.

“prior express consent” of the called party (*i.e.*, the text message recipient),<sup>36</sup> consistent with Commission precedent.<sup>37</sup>

By calling the YouMail user, the caller has an expectation that the YouMail user will answer that call or provide an opportunity to leave a message. If the caller is routed to the YouMail user’s voicemail the caller may leave a call back number, or by not blocking caller id, consent to leave the call back number on the device. When the YouMail user is temporarily unable to answer the incoming call directly (for safety or other reasons), the one-time voicemail reply text messages are sent as the user’s proxy answer. Moreover, the Commission has previously found that “persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.”<sup>38</sup> Specifically, it has stated that the provision of a wireless telephone number to the caller “reasonably evidences prior express consent” to be contacted at that number.<sup>39</sup> By taking the additional step of leaving a voicemail, the caller has affirmatively provided his or her telephone number to the YouMail user, whether on the voicemail itself or as

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<sup>36</sup> See 47 U.S.C. § 227(b)(1)(A); 47 C.F.R. § 64.1200(a)(1).

<sup>37</sup> CTIA notes that the Commission has repeatedly confirmed that wireless carriers may send free-to-end-user messages to their subscribers without obtaining additional consent. Any action on the Petition should have no impact on carriers’ ability to send such messages.

<sup>38</sup> *1992 TCPA Order* at 8769 ¶ 31 (internal citations omitted) (noting that “in such instances the called party has in essence requested the contact by providing the caller with their telephone number for use in normal business communications.”).

<sup>39</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Request of ACA International for Clarification and Declaratory Ruling*, Declaratory Ruling, 23 FCC Rcd 559, 564-65 ¶¶ 9-10 (2008) (emphasis added) (stating that the provision of a cell phone number to a creditor “reasonably evidences prior express consent” to be contacted at that number regarding the debt).

part of the voicemail data routinely provided to the voicemail recipient (*e.g.*, date and time of the call, telephone number of the caller).<sup>40</sup>

In the *SoundBite Declaratory Ruling*, the Commission found that “prior express consent” encompasses consent to receive a one-time, opt-out confirmation text message reply.<sup>41</sup> It noted that the reply operates as a “receipt” of the opt-out request. Similarly, a voicemail reply text message provides the called party’s answer to the call, confirms receipt of both the call and the voicemail, and can provide the caller with useful information as to why the called party was unable to answer the call directly.

## **V. NON-TELEMARKETING VOICEMAIL REPLY TEXT MESSAGES ADVANCE THE GOALS OF THE TCPA AND THE COMMISSION’S TCPA DECISIONS**

In addition to the consumer benefits, informational, non-telemarketing voicemail reply text messages advance the TCPA’s goal of improving public safety. For example, these reply text messages can be used in distracted driving mobile device applications. Such applications enable drivers to remain focused on the road rather than responding to calls or text messages, and the Commission should support and promote their use.

Many CTIA members, including wireless carriers and more than 200 other organizations, participate and actively support the “It Can Wait” campaign, which targets distracted driving by encouraging consumers to pledge not to text while driving.<sup>42</sup> Many other

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<sup>40</sup> This affirmative step of leaving a voicemail is also distinguishable from the “capturing” of a number by a Caller ID or ANI device. *See id.* 1992 TCPA Order at 8769 ¶ 31.

<sup>41</sup> *SoundBite Declaratory Ruling* at 15391 ¶ 7.

<sup>42</sup> “Cellphone Carriers Stand Together on Anti-Texting ‘It Can Wait’ Campaign,” Fox News Latino (May 15, 2013), *available at* <http://latino.foxnews.com/latino/money/2013/05/15/cellphone-carriers-stand-together-on-anti-texting-it-can-wait-campaign/> (last accessed Aug. 2, 2013); Steve Largent, “CTIA Statement on AT&T’s ‘It Can Wait’ Safe Driving Announcement,” <http://blog.ctia.org/2012/08/15/att-it-can-wait/> (last accessed Aug. 2, 2013). In addition, Verizon, Sprint, AT&T and T-Mobile each offer applications that can be downloaded by consumers that enable the blocking of text messages and other voice and data functions while a mobile device is in motion. *See* Safely Go (Verizon), [river.safely.stop.texting.driving&hl=en](http://river.safely.stop.texting.driving&hl=en); Drive First (Sprint),

industry efforts have targeted distracted driving, including AAA's national campaign to ban in all fifty states text messaging while driving;<sup>43</sup> Allstate Insurance Company's Teen Driver Pledge campaign;<sup>44</sup> and the TextKills outreach program that partners with law enforcement, schools, non-profits, community outreach programs and corporate safety officers to increase public awareness of the dangers of texting while driving.<sup>45</sup>

Other applications that function like YouMail also improve public safety by allowing users to respond to messages without picking up a device. For example, Twist is an application that uses a smartphone's GPS to send text messages to pre-determined contacts with the time that the user will arrive at a certain location.<sup>46</sup> Applications such as Auto Reply SMS/Calls<sup>47</sup> and Smart Response Pro<sup>48</sup> allow users to automatically respond to incoming texts or missed calls without having to pick up their mobile device, while other applications such as Auto SMS<sup>49</sup> and

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<https://play.google.com/store/apps/details?id=com.locationlabs.sdf>; Drive Mode (AT&T), <https://play.google.com/store/apps/details?id=com.drivemode>; Drive Smart (T-Mobile), <http://support.t-mobile.com/docs/DOC-2374>) (all last accessed August 5, 2013).

<sup>43</sup> "AAA Campaign Aims to Pass Texting While Driving Bans in All 50 States by 2013," <https://www.aaafoundation.org/aaa-campaign-aims-pass-texting-while-driving-bans-all-50-states-2013-together-foundation-launches-0> (last accessed Aug. 2, 2013).

<sup>44</sup> Allstate Teen Driving, <http://www.allstate.com/auto-insurance/teen-text-pledge.aspx> (last accessed Aug. 2, 2013).

<sup>45</sup> TextKills, <http://textkills.com/> (last accessed Aug. 2, 2013).

<sup>46</sup> Twist, <http://www.twist.com/> (last accessed Aug. 2, 2013).

<sup>47</sup> Auto Reply SMS/Calls, <https://play.google.com/store/apps/details?id=com.BeetelRockAutoReply&hl=en> (last accessed Aug. 2, 2013).

<sup>48</sup> Smart Response Pro, <http://www.appbrain.com/app/smart-response-pro/com.panoptics.app.smartresponsepro#descriptionsection> (last accessed Aug. 3, 2013).

<sup>49</sup> Auto SMS, <https://play.google.com/store/apps/details?id=com.tmnlab.autoresponder> (last accessed Aug. 2, 2013).

Safest Text Auto Reply<sup>50</sup> give users even more control by allowing them to schedule automated reply texts to be sent immediately in response to a call or text message, or at some future time.

Finding that the sending of a single informational, non-telemarketing voicemail reply text message is permissible under the TCPA also advances the Commission's statement in the recent *Robocall Report and Order* that it does not want to "impede" or "unnecessarily restrict" purely informational calls.<sup>51</sup> As the Commission recognized, consumers have "come to rely" on a number of "highly desirable" services related to informational calls,<sup>52</sup> and voicemail replies support these services. For example, the one-time voicemail reply text messages facilitated by the YouMail application can help individuals manage their communications while they are driving a car, traveling internationally or aboard a plane, or attending a class or at work, thus increasing the ability of these individuals to respond promptly to time-sensitive messages. The receipt of the confirmatory text messages also benefits callers, as it provides them with immediate access to the information contained in the custom text message included by the YouMail user. In light of these benefits, and the lack of any of the harms contemplated by the TCPA, the Commission should confirm that parties may send informational, non-telemarketing voicemail reply messages without being exposed to TCPA class action litigation.

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<sup>50</sup> Safest Text Auto Reply, <https://play.google.com/store/apps/details?id=com.client.SMSAnsweringMachine> (last accessed Aug. 2, 2013).

<sup>51</sup> See *Robocall Report and Order* at ¶ 21.

<sup>52</sup> *Id.* at ¶ 29.



## VI. CONCLUSION

For the foregoing reasons, the Commission should grant the Petition and confirm that the TCPA allows parties to send an immediate, one-time non-telemarketing voicemail text message reply. Such messages do not involve the use of an “autodialer” and are not “made” by YouMail but, even if they were, they are sent with the “prior express consent” of the called party. In addition, these non-telemarketing voicemail reply text messages advance the TCPA’s goals of improving public safety and the Commission’s efforts not to unnecessarily restrict important non-telemarketing calls to consumers at their wireless telephone numbers.

Respectfully submitted,

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August 9, 2013